Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-561

ANDREW BERRADA,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Andrew Berrada petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The judgment of the court of appeals is reproduced as Appendix "A". In affirming petitioner's judgment of conviction the court rendered an oral opinion which touched on certain of petitioner's contentions on appeal. The opinion is not reported, but a transcript thereof was requested from the Clerk's Office of the United States Court of Appeals for the Second Circuit on September

30, 1976, and to the date of filing of this petition has not been received. The oral statement consequently will be filed with the Clerk of the Court separately.

Jurisdiction

The judgment of the court of appeals was entered on September 22, 1976, and this petition for certiorari was filed within thirty days of that date. The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

Questions Presented

1. Whether the variance between proof at trial and the conspiracy charged in the criminal indictment, which delineated as the fact pattern embracing a single over-all conspiracy four distinct incidents and specifications of theft and the criminal possession of proceeds of shipments of goods moving in interstate commerce, mandates reversal and dismissal of the conspiracy count against petitioner?

2. Whether the error of variance between proof at trial and the conspiracy charge in the indictment mandates reversal of the judgment of conviction and the grant of a new trial absent showing of clear and certain prejudice to the criminal defendant?

3. Whether an out of court photographic identification of a criminal defendant made on the basis of "Italian eyes" was a competent identification of a person, admissible in evidence under Rule 801(d)(1)(C) of the Federal Rules of Evidence?

Constitutional Provision and Rule Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

Rule 801(d)(1)(C) of the Federal Rules of Evidence provides in pertinent part:

> "A statement is not hearsay if . . . one of identification of a person made after perceiving him . . . ."

Statement

A five-count indictment was lodged in the United States District Court for the Eastern District of New York, charging petitioner with three others with four counts of substantive violations under §§ 659 and 2, Title 18, United States Code, and with one count of conspiracy to commit the aforesaid substantive offenses in violation of Section 371, Title 18, United States Code. After trial by jury in the Eastern District of New York, judgment of conviction was entered against petitioner with respect to the conspiracy charge, and with regard to two substantive counts charging him with theft of goods from interstate commerce and possession of the proceeds of the aforesaid theft, both in violation of §§ 659 and 2, Title 18, United States Code. The date involved in the alleged theft and in the two above-said counts on which petitioner stood convicted was June 28, 1973. Petitioner was acquitted of the two remaining substantive counts which covered an alleged theft and criminal possession on or about May 7, 1973.

The Grand Jury charged the four named defendants with conspiracy to "knowingly and wilfully steal, receive and have in their possession approximately four shipments of goods which had been stolen while moving as a part of interstate commerce . . . ." The conspiracy count delineated the dates of the four thefts as follows: April 27, 1973, May 7, 1973, May 29, 1973, June 28, 1973. There absolutely was no competent proof at the trial of the case that petitioner had any connection, direct, indirect or otherwise, with the April 27, 1973, theft. The Government in its brief to the United States Court of Appeals for the Second Circuit confirmed this fact by stating as follows:

> "Because appellant Berrada participated in three out of the four hijackings set forth in the conspiracy count of the indictment it is difficult to conceive how he was prejudiced by the additional testimony concerning the April 27 hijacking which occurred approximately two weeks before he actively joined the conspiracy."

Berrada consequently had no relation to the allegations concerning the April 27, 1973, theft and it is reiterated that petitioner was acquitted of the substantive offenses regarding the May 7, 1973, theft. Resultantly, it appears that the Government's assertion that petitioner participated in "three out of the four hijackings" and actively joined the conspiracy two weeks after the April 27, 1973 hijacking rests on a most tenuous if not frivolous foundation.

Reasons for Granting the Writ

1. Berrada claimed variance between the proof at trial and the allegations contained in the conspiracy count. The court of appeals apparently convinced that no prejudice inured to petitioner, found no plain error and affirmed his judgment of conviction in all respects.

The indictment founded by Grand Jury action charged Berrada in a single conspiracy revolving about four thefts. The conspiracy charged was one over-all conspiracy embracing the four thefts, and the Grand Jury charge was not in the disjunctive.* Consequently, because it was im-

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* Count Five of the indictment, charging petitioner with conspiracy, was as follows:

COUNT FIVE

On or about and between the 1st day of April 1973 and the 1st day of July 1973, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOSEPH DI GISO, ANTHONY CONTRERAS, ANDREW BERRADA and ROBERT DOMINICI, also known as "Bobby" did knowingly, intentionally and wilfully combine, conspire, confederate and agree, together with Thomas Tavolacci, and Albert Strouse, also known as "Albie" named as co-conspirators but not as a defendants herein, and with others, to commit offenses against the United States in violation of Title 18, United States Code, Section 659 and Section 2, to wit: to knowingly and wilfully steal, receive and have in their possession approximately four shipments of goods which had been stolen while moving as a part of interstate commerce as follows:

Approximate Date of Theft	*Carrier*	*Contents of Shipment*	*Interstate Nature of Shipment*
April 27, 1973	United Merchant and Manufacturing Co.	Piece Goods	South Carolina—New York
May 7, 1973	Cooper Motor Lines	Yarn	South Carolina — New York
May 29, 1973	Cooper Motor Lines	Piece Goods	South Carolina — New York
June 28, 1973	Carolina Mills	Yarn	North Carolina — New York

The defendants JOSEPH DI GISO, ANTHONY CONTRERAS, ANDREW BERRADA and ROBERT DOMINICI, also known as "Bobby" and the unindicted co-conspirators Tavolacci and Strouse then knowing the said goods to have been stolen.

In furtherance of said conspiracy and to effect the objectives thereof, the defendants JOSEPH DI GISO, ANTHONY CON-

[Footnote continued on following page]

plicitly conceded by the Government that Berrada had no connection with the April 27, 1973, theft and because the record below supports petitioner's assertion that there was no proof evidencing any connection with the alleged April 27, 1973, hijacking, petitioner submits that such variance as a matter of law, and without need of any showing of prejudice, mandates the reversal of the conspiracy count of the indictment.* This Court long ago in *Ex Parte Bain*, 121 U.S. 1, 9, 10 (1887), established the well-recognized rule that no court of law may amend or modify the Grand Jury charge:

> "If it is within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest the changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime and without which the constitution says 'no person shall be held to answer' may be fritted away until its value is almost destroyed."

In accord, *Stirone* v. *United States*, 361 U.S. 212 (1960); *Russell* v. *United States*, 369 U.S. 749 (1962). The proof at trial evidenced multiple conspiracies, or at a minimum evidenced that Berrada was not part and parcel of the single overall conspiracy charged in the indictment. Moreover, the jury acquitted Berrada of the substantive offenses regarding the May 7, 1973 alleged theft. Consequently, the conspiracy count must be reversed inasmuch as it is submitted that regardless of any claim or showing of prejudice, the variance between the charge and the proof cannot as a matter of law be countenanced; otherwise, the Grand Jury charge is nothing less than being materially amended or modified to conform to the proof at trial. The Court is asked to consider the question whether a judgment of conviction can stand with reference to a conspiracy charge, where there is no proof that the criminal defendant was implicated in the distinct incidents or fact patterns which comprised the Grand Jury charge of a single overall conspiracy. Cf. *United States* v. *Natelli*, 527 F.2d 311, 325, 328 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1663 (1976). It is submitted that to support the judgment of conviction against appellant on the conspiracy count, would be a modification of the Grand Jury charge which no prosecutor or court of law has the power in our mode of jurisprudence.

TRERAS, ANDREW BERRADA and ROBERT DOMINICI, also known as "Bobby" and the unindicted co-conspirators Thomas Tavolacci, and Albert Strouse, also known as "Albie" committed the following:

OVERT ACTS

1. On or about April 27, 1973 the defendants JOSEPH DI GISO and ANTHONY CONTRERAS met with co-conspirators Thomas Tavolacci and Albert Strouse, also known as "Albie".

2. On or about June 28, 1973 the defendant JOSEPH DI GISO met with the defendants ROBERT DOMINICI, also known as "Bobby" and ANDREW BERRADA and co-conspirator Thomas Travolacci in Brooklyn, New York.

3. The Grand Jury repeats and realleges as though fully set forth herein, the allegations contained in the first four counts of this indictment. (Title 18, United States Code, Section 371).

* Petitioner was sentenced to a term of five years' imprisonment on the conspiracy charge to run concurrent with a term of seven years imposed on the two substantive counts. Reversal of the conspiracy count would warrant reconsideration of the sentence imposed by the sentencing judge. *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *DeMarco*, 488 F.2d 828 (2d Cir. 1973); *United States* v. *Mancuso*, 485 F.2d 275 (2d Cir. 1973). These cases hold that remand is appropriate in cases where conviction is reversed on one or more counts, because of the possibility that the conviction on all counts originally before the sentencing court might have effected the punishment for each.

2. Petitioner submitted to the court of appeals that the proof disclosed multiple conspiracies, and the variance warranted reversal of petitioner's judgment of conviction. *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975). The Second Circuit in the case at bar, in accord with its decision in *United States* v. *Toliver*, — F.2d — (2d Cir. 9/2/76), stated that the variance must be shown to affect the substantial rights of the accused. Petitioner submits that although the number of defendants was relatively limited in his case compared to the cases in which multiple conspiracy issues have been successfully raised, cf. *United States* v. *Bertolotti, supra*, he submits that the very fact that the conspiracy charge was submitted to the jury was to his clear and certain detriment. Without doubt, the exact manner the prejudice to him inured is most difficult to pinpoint; however, it is apparent that if the conspiracy charge was dismissed against him, as we submit it should have been, this would have been to his advantage, and would have freed him in the minds of the jurors of the all-embracing charge in the indictment. The Court aptly noted in *Chapman* v. *California*, 386 U.S. 18, 24 (1967):

> ". . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Additionally, the failure to dismiss the conspiracy count against petitioner when coupled with petitioner's contention that an incompetent photographic identification was permitted by the trial court in evidence, gives sufficient credence to petitioner's claim that rudiments of essential fairness warrant the grant of a new trial. Where the trial court was faced with a clear variance between proof and charge, and where the trial court's

charge was out of accord with requirements,* the burden of showing prejudice by a criminal defendant in a criminal prosecution need not be one so great or so certain.

3. Petitioner claims that an out of court photographic identification of him by a crucial trial witness on the basis of "Italian eyes" was blatantly prejudicial to him at the trial of his case. The witness could not make an in court identification of the petitioner. Nevertheless, the trial court denied a motion to suppress the identification.

Rule 801(d)(1)(C) of the Federal Rules of Evidence provides in pertinent part that "[a] statement is not

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* The trial court's charge with regard to the conspiracy count in pertinent part was as follows:

> "Although the indictment charges a single conspiracy, it would be possible to find separate conspiracies, one relating to the willful combination and conspiracy to knowingly and intentionally and unlawfully take from motor trucks goods and materials of a value of $100 or more, which goods had been moving as a part of or constituting part of an interstate shipment of property, and the other conspiracy to knowingly and intentionally receive and possess such goods and material, the conspirators knowing the same to have been stolen.
>
> "Whether there was one conspiracy or two conspiracies, or no conspiracy at all is a fact for you to determine in accordance with these instructions."

The charge negated the fact that if all of the activities specifically charged in the conspiracy count were shown to have been, in fact, a conglomeration of separate conspiracies, and that the hijackings were not connected, the jury was obliged to acquit. The charge given was incomprehensible with regard to this principle. See *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1742 (1976); *United States* v. *Cohen*, 518 F.2d 727 (2d Cir. 1975); *United States* v. *Sperling*, *supra*, 506 F.2d at 1341; *United States* v. *Bynum*, 485 F.2d 490, 497 (2d Cir. 1973).

hearsay if . . . one of identification of a person made after perceiving him."

Approximately one year after the witness purportedly sat directly behind petitioner, the latter claimed to be the driver of the witness' hijacked truck, the witness was shown a photographic spread. Only one photograph, according to the witness, had the particular trait attributed to the driver of his hijacked truck: "Italian eyes".*

The witness' examination at trial by defense counsel evidences the incompetency of the identification:

> "Q. What did the second fellow look like? A. He had black hair. His eyes resembled a commercial with Andy Granatelli in it, definitely Italian. The eyes I guess you would say were the outstanding characteristic.
>
> "Q. You don't recall ever seeing this fellow before? A. I don't recall seeing this fellow before.
>
> "Q. Do you recall anything else about the second fellow? A. Not an awful lot.
>
> * * * * *
>
> "Q. Who is Andy Granatelli? A. At the time he was executive or president of STP Corporation that had an awful lot of advertising on television and various magazines.
>
> "Q. And you saw his picture, too? A. Yeah.
>
> "Q. And his eyes looked like the eyes of the second man as well? A. Right.
>
> * * * * *

* The witness testified he sat directly behind the driver and that he only saw the driver's face briefly. The witness did not consider it a good look at the driver.

> "Q. You know other eyes that look like the second man and pictures here, and Andy Granatelli? A. I do.
>
> "Q. In other words, you have seen many eyes that look like the eyes of the second man? A. That's correct."

The Government argued that under *United States* v. *Simmons*, 390 U.S. 377 (1968), the questioned danger of the identification was properly lessened and accommodated through counsel's opportunity to examine the witness. However, such argument distorts well-established guidelines and safeguards, meant to assure a criminal defendant a fair trial. As a matter of law, the identification was incompetent. This was buttressed by the failure of the witness to make an in court identification.

United States ex rel. Phipps v. *Follette*, 428 F.2d 912 (2d Cir. 1970), warned of the dangers inherent on poor opportunities for observation and lapsed time between the crime and confrontation; two additional factors which should have swayed the trial court to preclude the photographic identification from reception in evidence.

The witness, according to his testimony, covered the faces of the individuals on the photographs and selected petitioner on the basis of his "Italian eyes". This is not the "identification of a person" contemplated or intended under Rule 801(d)(1)(C) of the Federal Rules of Evidence. The identification in issue was so inadequate that its admission flies in the face of justice and served no purpose other than to prejudice the petitioner in the minds of the jury. The witness' out of court identification directly bore on the May 29, 1973, theft.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of September, one thousand nine hundred and seventy-six.

Present: HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS
HON. MURRAY I. GURFEIN
Circuit Judges,

76-1259

76-1281

76-1290

UNITED STATES OF AMERICA,
Plaintiff-Appellee

—v.—

JOSEPH DI GISO, ANTHONY CONTRERAS, ANDREW BERRADA and ROBERT DOMINICI, a/k/a "Bobby",
Defendants,

ANTHONY CONTRERAS, JOSEPH DI GISO, ANDREW BERRADA,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Order of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk